



Brief History on Legislation Governing Trade- and Investment-Related Activities and “Impact on Jobs in the United States” and "Workers' Rights" Provisions

An Additional Help for ADS Chapter 225

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Section 601 of the Foreign Assistance Act of 1961, codified at 22 U.S.C. § 2351 states that it is

the policy of the United States to encourage the efforts of other countries to increase the flow of international trade, to foster private initiative and competition, to encourage the development and use of cooperatives, credit unions, and savings and loan associations, to discourage monopolistic practices, to improve the technical efficiency of their industry, agriculture, and commerce, and to strengthen free labor unions; and to encourage the contribution of United States enterprise toward economic strength of less developed friendly countries, through private trade and investment abroad, private participation in programs carried out under this chapter (including the use of private trade channels to the maximum extent practicable in carrying out such programs), and exchange of ideas and technical information on the matters covered by this subsection.

To accomplish the stated policies, section 601 directs the President, among other listed activities, to

(1) make arrangements to find, and draw the attention of private enterprise to, opportunities for investment and development in less-developed friendly countries and areas;

(2) establish an effective system for obtaining adequate information with respect to the activities of, and opportunities for, nongovernmental participation in the development process, and for utilizing such information in the planning, direction, and execution of programs carried out under this chapter, and in the coordination of such programs with the ever-increasing developmental activities of nongovernmental United States institutions; [and]

(3) accelerate a program of negotiating treaties for commerce and trade, including tax treaties, which shall include provisions to encourage and facilitate the flow of private investment to, and its equitable treatment in, friendly countries and areas participating in programs under this chapter....

Beginning in 1993, Congress began to include in its annual appropriations legislation provisions that impact and limit trade- and investment-related section 601 activities if the activities have certain, listed impacts on U.S. jobs or on workers' rights. Titled in relevant legislation as "Impact on Jobs in the United States," these provisions

appear in every annual appropriations act since 1993. For example, in section 7080 of the Consolidated Appropriations Act, 2016, Congress stated that

None of the funds appropriated or otherwise made available under titles III through VI of this Act may be obligated or expended to provide—

(1) any financial incentive to a business enterprise currently located in the United States for the purpose of inducing such an enterprise to relocate outside the United States if such incentive or inducement is likely to reduce the number of employees of such business enterprise in the United States because United States production is being replaced by such enterprise outside the United States;

(2) assistance for any program, project, or activity that contributes to the violation of internationally recognized workers' rights, as defined in section 507(4) of the Trade Act of 1974, of workers in the recipient country, including any designated zone or area in that country: Provided, That the application of section 507(4)(D) and (E) of such Act should be commensurate with the level of development of the recipient country and sector, and shall not preclude assistance for the informal sector in such country, micro and small-scale enterprise, and smallholder agriculture;

(3) any assistance to an entity outside the United States if such assistance is for the purpose of directly relocating or transferring jobs from the United States to other countries and adversely impacts the labor force in the United States; or

(4) for the enforcement of any rule, regulation, policy, or guidelines implemented pursuant to— (A) the third proviso of subsection 7079(b) of the Consolidated Appropriations Act, 2010; (B) the modification proposed by the Overseas Private Investment Corporation in November 2013 to the Corporation's Environmental and Social Policy Statement relating to coal; or (C) the Supplemental Guidelines for High Carbon Intensity Projects approved by the Export-Import Bank of the United States on December 12, 2013, when enforcement of such rule, regulation, policy, or guidelines would prohibit, or have the effect of prohibiting, any coal fired or other power-generation project the purpose of which is to: (i) provide affordable electricity in International

Development Association (IDA)-eligible countries and IDA-blend countries; and (ii) increase exports of goods and services from the United States or prevent the loss of jobs from the United States.¹

Previous versions of the “Impact on Jobs in the United States” provisions are similar, but the particular listed prohibitions vary in some measure over time.² The legislative history of one of the earliest “Impact on Jobs in the United States” provisions—section 547 of the Appropriations Act, 1994—recognizes that the prohibitions were made in the context of a consistent postwar policy to support foreign direct investment by U.S. firms. The policy is based on the link that foreign direct investment by U.S. firms has with growing economies abroad, increasing U.S. exports, and increasing U.S. jobs. The legislative history of section 547(a) makes clear that it was not intended to prohibit all activities that could tangentially or indirectly result in U.S. investments that may also involve a relocation overseas, but only those activities intentionally or knowingly directed at promoting such investments in the recipient country. The legislative history distinguishes between promoting U.S. foreign investment on one hand and persuading U.S. firms to relocate abroad on the other hand, particularly when such relocation results in a reduction of existing U.S. jobs due to the replacement of existing U.S. production with production abroad.

¹ Consolidated Appropriations Act, 2016, P.L. 114-113, 129 Stat. 2821 (Dec. 18, 2015).

² For example, in the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1993, P.L. 102-391, 106 Stat. 1633 (Oct. 6, 1992), section 599 listed three prohibitions, including text that was similar to section 7080 (1) and (2) in the Appropriations Act, 2016, but it also included a provision that prohibited assistance for the establishment or development of certain export processing zones, a provision that was not included in the Appropriations Act, 2002 or in any subsequent appropriations legislation. For the text of other “Impact on Jobs in the United States” provisions since 1992, *see* Appropriations Act, 1994, P.L. 103-87 (Sep. 30, 1993) at § 547; Appropriations Act, 1995, P.L. 103-306 at § 545; Appropriations Act, 1996, P.L. 104-107 at § 539; Appropriations Act, 1997, P.L. 104-208 (Sep. 30, 1996) at § 538; Appropriations Act, 1998, P.L. 105-118 at § 538; Appropriations Act, 1999, P.L. 105-277 (Oct. 21, 1998) at § 538; Appropriations Act, 2000, P.L. 106-113 (Nov. 29, 1999) at § 536; Appropriations Act, 2001, P.L. 106-429 (Nov. 6, 2000) at § 536; Appropriations Act, 2002, P.L. 107-115 (Jan. 10, 2002) at § 533 (in which earlier subsection (b) was deleted, leaving subsection (a) and earlier subsection (c) as newly renumbered subsection (b)); Appropriations Act, 2003, P.L. 108-7 at § 533; Appropriations Act, 2004, P.L. 108-199 (Jan. 23, 2003) at § 533 (in which earlier subsections (a) and (b) were renumbered as new subsections (1) and (2)); Appropriations Act, 2005, P.L. 108-447 (Dec. 8, 2004) at § 533; Appropriations Act, 2006, P.L. 109-102 at § 533; Appropriations Act, 2008, P.L. 110-161 at § 632; Appropriations Act, 2009, P.L. 111-8 at § 7029; Appropriations Act, 2010, P.L. 111-117 at § 7029; Appropriations Act, 2012, P.L. 112-74 at § 7028; Appropriations Act, 2014, P.L. 113-76 at § 7081 (in which subsections (3) and (4) were added); and Appropriations Act, 2015, P.L. 113-235 § 7086 (removing a time limitation on subsection (3)).

The legislative history of section 7081 of the Appropriations Act, 2014 states that subsection (4) was added

to allow support by the Export-Import Bank of the United States and the Overseas Private Investment Corporation for coal-fired and other power generation projects in International Development Association (IDA) and IDA-blend eligible countries. This provision is expected to increase affordable electricity, especially to those without current access to electricity, as well as to support increased exports from the United States and prevent the loss of United States jobs.³

In addition to the “Impact on Jobs in the United States” provisions, recent annual appropriations legislation also includes provisions related to “Surplus Commodities.” Most recently, in section 7025(a) of the Consolidated Appropriations Act, 2016, Congress stated that

(a) WORLD MARKETS.—None of the funds appropriated or made available pursuant to titles III through VI of this Act for direct assistance and none of the funds otherwise made available to the Export-Import Bank and the Overseas Private Investment Corporation shall be obligated or expended to finance any loan, any assistance, or any other financial commitments for establishing or expanding production of any commodity for export by any country other than the United States, if the commodity is likely to be in surplus on world markets at the time the resulting productive capacity is expected to become operative and if the assistance will cause substantial injury to United States producers of the same, similar, or competing commodity: Provided, That such prohibition shall not apply to the Export-Import Bank if in the judgment of its Board of Directors the benefits to industry and employment in the United States are likely to outweigh the injury to United States producers of the same, similar, or competing commodity, and the Chairman of the Board so notifies the Committees on Appropriations: Provided further, That this subsection shall not prohibit— (1) activities in a country that is eligible for assistance from the International Development Association, is not eligible for assistance from the International Bank for Reconstruction and Development, and does not export on a consistent basis the

³ Joint Explanatory Statement of the Committee of Conference, Consolidated Appropriations Act, 2014, Division K, at p. 61.

agricultural commodity with respect to which assistance is furnished; or (2) activities in a country the President determines is recovering from widespread conflict, a humanitarian crisis, or a complex emergency.⁴

The relevant legislation on internationally recognized workers' rights, as defined in 19 U.S.C. 2467(4.) was subsequently amended by the Trade and Development Act of 2000 and Bipartisan Agreement on Trade of May 10, 2007. The term 'labor rights' is now used with respect to free trade agreements and Overseas Private Investment Corporation safeguards. "Internationally recognized workers' rights" are:

- a. The right of association;
- b. The right to organize and bargain collectively;
- c. A prohibition on the use of any form of forced or compulsory labor;
- d. A minimum age for the employment of children; and a prohibition on the worst forms of child labor; and
- e. Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

The term "labor rights" includes all of the above, and in addition,

- f. The elimination of discrimination in respect of employment and occupation

While the requirement for USAID projects only covers 'internationally recognized workers' rights', all US government agencies are also required to prohibit forced labor or the worst forms of child labor. Two executive orders, E.O. 13126 and E.O. 13627, require federal contractors to ensure that they are not using child or forced labor in their operations. With respect to trade and US jobs, forced labor is recognized under 19 U.S.C. 2411 (d) and 19 U.S.C 1307 as constituting an unfair trade practice that undermine U.S. jobs.

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⁴ Consolidated Appropriations Act, 2016, P.L. 114-113, 129 Stat. 2821 (Dec. 18, 2015).